IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO 9790 of 1999
with
SPECIAL CIVIL APPLICATION NO 1265 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

K K SOLANKI

Versus

MEMBER SECRETARY

Appearance:

1. Special Civil Application No. 9790 of 1999
MR MS TRIVEDI for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1
MS BHATT for MR MANISH R BHATT for Respondent No. 1
RULE SERVED for Respondent No. 2

2. Special Civil Application No. 1265 of 2000
MS BHATT for Mr.M.R.Bhatt for the petitioner
MR MS TRIVEDI for the respondent

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 25/06/2003

ORAL COMMON JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. Both these petitions are disposed of by this common Judgment as they are arising out of the impugned Judgment and order dated 12.10.1999 passed by the Central Administrative Tribunal, Ahmedabad Bench (for short "the Tribunal) in O.A. No.115 of 1997.

2. Special Civil Application No.1265 of 2000 is filed by the Union of India and the Chief Commissioner of Income-tax against the impugned Judgment and order dated 12.10.1990 passed by the Tribunal whereby the learned Tribunal allowed the O.A.No. 115 of 1997 filed by the respondent original applicant directing the respondent present petitioner to carry out the exercise of stepping up of the pay of the applicant at par with his junior with effect from 5.8.1982 within 3 months from the date of receipt of the order and to rectify the anomaly in the pay of the applicant with effect from 5.8.1982 within 3 months from the date of receipt of the order and to rectify the anomaly in the pay of the applicant with effect from 5.8.1982 and refix his pay thereafter in accordance with the prevailing rules and the applicant is entitled to the arrears of salary of one year prior to the date of filing the O.A. and give such benefit to the applicant, including the arrears of salary of one year prior to the date of filing of Application.

3. Ms.Bhatt, learned Counsel, appearing for the petitioner firstly submitted that there was gross delay on the part of the applicant in approaching the Tribunal, therefore, on the ground of delay of more than 3 years the Tribunal should have rejected the Application. We do not find such submission made before the Tribunal. However, it was sought to be contended by Ms.Bhatt that the contention regarding delay was raised before the Tribunal, but unfortunately it was not dealt with by the Tribunal in its order. Apart from the fact that no such specific contention is raised in Special Civil Application No.1265 of 2000, filed by the petitioner, we are of the considered opinion that if such contention was raised before the Tribunal and the Tribunal has not dealt with such contention in its order then the petitioner should have first approached the Tribunal by way of Review and invited the decision of the Tribunal on such point as held by the Hon'ble Supreme Court in the case of STATE OF MAHARASHTRA v/s. RAMDAS NAYAK reported in AIR

1982 SC 1249. Under the circumstances the contention of Ms.Bhatt has to be rejected.

4. Ms.Bhatt then submitted that she may be allowed to raise the contention regarding delay before this Court. We would not permit such contention to be raised for the first time in a petition under Article 226 of the Constitution of India.

5. Ms.Bhatt then submitted that the Tribunal has committed an error in applying the fundamental Rule 22(C). She submitted that the respondent - applicant stepped up in promotion and permitted from the post of Head Clerk to the post of Inspector, whereas Mr.Parmar was promoted first to the post of Supervisor and then to the post of Inspector, therefore, he will get the benefit of 2 increments on 2 promotion. Therefore, though he was junior his salary was more than the salary of the present respondent - original applicant. In support of her submission Ms.Bhatt has relied on 3 Judgments of the Hon'ble Supreme Court, viz.

i) AIR 1997 SC 2978 - UNION OF INDIA & ORS V/S. R.D.CHAUDHARY

ii) AIR 1997 SC 2983 - E.S.I. CORPORATION v/s. P.K.SRINIVASMURTHY & ANR.

iii) AIR 1998 SC 1925 - UNION OF INDIA v/s. SUSHIL KUMAR PAUL & ORS.

6. For appreciating the aforesaid contention of Ms.Bhatt, we would like to first reproduce the comparative table furnishing relevant service particulars of the respondent - original Applicant Shri K.K.Solanki with Shri A.H.Parmar to understand the nature of anomaly regarding the salary between them in this case :

K.K.SOLANKI			A.H.PARMAR		
Cadre	Date of appointment	Pay	Cadre	Date of appointment	Pay
L.D.C.	01.09.56	55	L.D.C.	-	-
"	16.07.58	63	"	16.07.58	60
U.D.C.	13.12.62	140	U.D.C.	06.11.63	140

H.C.	18.06.69	210	H.C.	06.12.69	210
Super-visor	-	-	Super-	12.06.72	335
Inspe-ctor	21.11.69	230	-	-	-
"	18.07.73	485	Inspe-ctor	18.07.73	620
I.T.O.	23.01.77	650	"	23.01.77	650
"	05.08.82	810	I.T.O.	05.08.82	880

From the above, it is clear that the original Applicant Shri K.K.Solanki - present respondent was first appointed on the lower post of L.D.C. on 1.9.56 and on 16.7.1958 his pay was Rs.63/- whereas his junior Shri A.H.Parmar was appointed on the post of L.D.C. for the first time on 16.7.1958 and at that time his pay was only Rs.60/-. Thereafter, Shri Solanki was promoted on the higher post of U.D.C. on 13.12.1962 and at that time his salary was Rs.140/- whereas Shri Parmar was promoted on the post of U.D.C. later on i.e. on 6.11.1963 and his salary was Rs.140/-. Shri Solanki was promoted on a higher post of Head Clerk on 18.6.1969 whereas Shri Parmar was promoted as Head Clerk on 6.12.1969. At that time salary of both, Shri Parmar and Shri Solanki, were Rs.210/-. However, within a period of 5 months the applicant Shri Solanki was straightway promoted to the higher post of Inspector on 21.11.1969 and not on the post of Supervisor and at that time his salary was Rs.230/-, whereas Shri Parmar was first promoted on the post of Supervisor and at that time his salary was Rs.335/- and he came to be promoted on the higher post of Inspector only on 18.7.1973. At that time his salary was Rs.620/- whereas the applicant Shri Solanki was drawing the salary of Rs.485/- on 18.7.1973, the date on which Shri Parmar was promoted. It may be stated that thereafter both, Shri Solanki & Shri Parmar, were promoted simultaneously on the same day on 23.1.1997 to the higher post of I.T.O.and at that time their salary was Rs.650/-, but on 5.8.1982 the salary of the applicant Shri Solanki was Rs.810/- whereas the salary of Shri Parmar, I.T.O. was Rs.880/-.

In view of the above fact, relying on the Judgment of the Tribunal, delivered in OA No.474 of 1987, decided on 4.11.1988, filed by one Shri D.B.Solanki, the

Tribunal allowed the Application filed by Shri K.K. Solanki, as the Tribunal was of the opinion that there was anomaly which should be removed under Rule 22(C) of the Fundamental Rules.

7. Now in view of the peculiar facts of this case we will consider the aforesaid 3 Judgments cited by Ms.Bhatt for the petitioner.

O. P. SAXENA'S CASE (SUPRA)

There was a category of staff called "the running staff" involved in the running of train which includes driver, guards, firemen, shunters and brakesmen. The running staff were entitled to an allowance called the "running allowance" in view of the nature of their duties pertaining to the running of trains. The locomotive drivers were eligible for promotion amongst other posts, to those of Loco Supervisors. Shri Kareer and others, at one time, were holding the running post of Driver Grade-C. Shri Kareer had been promoted as Driver Grade-C on August 1961 and was placed in the grade of Rs.150-240 and others were promoted and appointed as Driver Grade-C from a date subsequent to 29th August 1961. Thus, Shri Kareer was senior to others in the post of driver Grade-C. Thereafter, those others, respondents of that case, opted for promotion to the stationary post of Loco Supervisor directly from the post of driver Grade-C. They were promoted on 1.1.1986 and placed in the grade of Rs.550-750, but Shri Kareer choose to remain in running staff. In 1981 he was promoted as Driver Grade-B in the scale of Rs.425-640 and his pay was fixed at Rs.580/-. Thereafter on 8.11.1984 Shri Kareer was promoted as Driver Grade-A in the scale of Rs.550-700. With effect from 1.1.1986 revised pay scales came into existence as a result of the 4th pay Commission Report and at that time the respondents were working on the stationary post of Loco Supervisor while Shri Kareer was working on the running post of Driver Grade-A. When Shri Kareer was appointed as Loco Supervisor, his pay was fixed after taking into account 30 % revised pay scale. Shri O.P. Saxena the respondent was stepped up but when the department found out that the benefit was wrongly given to him, therefore, the department refixed his salary and started recovery of the excess amount paid to him, that was challenged by Shri Saxena before the Tribunal in OA No.462 of 1994, which was allowed by the Tribunal by upholding that the stepping up pay was also admissible to Shri Saxena. Thus, on the peculiar facts of that case the Tribunal decided the case in favour of Shri Saxena. However, the Hon'ble Supreme Court has held that the

decision of the Tribunal stepping up of the pay of the respondent Shri Saxena was not correct and for that the Hon'ble Supreme Court had considered the letter dated 14.9.1990 issued by the Ministry of Railway. It is true that in that case also the respondent Shri Saxena did not make any claim for stepping up his salary as long as in service like the present case of Shri Solanki, but that would not come in the way of the applicant on the facts of this case. We will have to point out that before approaching the Tribunal when he was in service he asked for stepping up of his pay, but unfortunately the same was not decided till today and last in 1997 he approached the Tribunal.

Thus, in our considered opinion, the aforesaid Judgment of the Hon'ble Supreme Court, in Saxena's case (supra), will not have any application to the facts of this case.

8. Similar Judgment of the Hon'ble Supreme Court in E.S.I. Corporation v/s. P.K. Srinivasmurthy (supra) will have no application to the facts of the present case. In P.K.Srinivasmurthy's case there was cadre of U.D.C. which has three categories, viz. U.D.C. Cashier, U.D.C. Care-taker and U.D.C. In-charge. It was a normal practice of the Corporation to ask the Upper Division Clerks to exercise their option to work in any of the three categories. At the material time the post of UDC Cashier carried certain allowances including a cash allowance based on the total disbursement made by the UDC Cashier to the insured persons per month. Hence, the seniors generally opted for UDC Cashier's post. The pay scale of all UDCs were Rs.330-560. By Memorandum dated 22.3.1978 the scale of pay of UDCs In-charge was revised on an adhoc basis. It was also decided to allow this revised scale of pay to those who were actually working as UDCs In-charge on 1.1.1973 and afterwards. In 1986 the post of UDC In-charge was abolished. The next promotional post for UDCs was the post of Head Clerk. The respondent No.2 in that case had opted for the post of UDC In-charge. The respondent No.1 was senior to respondent No.2. He, however, opted for the post of UDC Cashier. The respondent No.1 was promoted as Head Clerk on 1.4.1978 earlier than respondent No.2. The pay fixation of respondent No.1 as Head Clerk was done under Fundamental Rule 22-C on the basis of the last pay drawn by him as UDC Cashier. As a result of which pay fixed for respondent No.1 in the post of Head Clerk was lower than the pay of respondent No.2 in the same cadre.

We failed to understand that how this Judgment of

the Hon'ble Supreme Court in P.K.Srinivasmurthy will have any application to the facts of the present case.

9. In case of UNION OF INDIA v/s. SUSHIL KUMAR PAUL, reported in AIR 1998 SC 1925, the Hon'ble Supreme Court had considered its previous Judgment in the case of O.P.Saxena (supra). The said Judgment has also no application to the facts of this case and therefore we have refrained ourselves from dealing with the same in detail because the aforesaid Judgments of the Hon'ble Supreme Court will have no application to the present case.

10. In the instant case the submission was made by Mrs.Bhatt for the petitioner that the present respondent - applicant was promoted and 2 increments were given by way of promotion to the higher post of Inspector, therefore, he can not make any grievance when his junior Shri Parmar was first promoted to the post of Supervisor and thereafter to the higher post of Inspector must be rejected as in our opinion the Tribunal has rightly rectified the anomaly in fixation of the pay of the respondent in its Judgment.

11. In view of the above discussion Special Civil Application No.1265 of 2000, filed by the petitioner - Union of India and Chief Commissioner of Income-tax is required to be dismissed.

12. This bring us to the counter petition i.e. Special Civil Application No.9790 of 1999 filed by the respondent - applicant through his learned Counsel Shri Trivedi.

The submission of Shri Trivedi is that when the Tribunal has allowed the Application of the applicant then it ought not to have restricted the benefit to the applicant for only one year prior to the filing of Application before the Tribunal. He submitted that he had also approached the Authority well in time, but the Authority did not redressed his grievance early, therefore, he was obliged to approach the Tribunal in 1997, but that itself should not be the ground for the Tribunal to deny the full benefit to the applicant. He, therefore, submitted that he was entitled for the benefit right from 1982, he may not be given any benefit from 1982, but he should be given benefit at least from 1989 when he first approached the Authority. In any case the Tribunal should have granted benefits from the date of filing OA in 1997. However, in our opinion, Mrs.Bhatt was right in submitting that there was delay on the part

of the applicant in approaching the Tribunal, therefore, when the Tribunal in its discretion thought it fit to grant benefit of only one year, therefore, this Court should not interfere with such discretionary order passed by the Tribunal in its writ jurisdiction under Article 227 of the Constitution.

13. In view of the above discussion both the petitions, viz. Special Civil Application No.9790 of 1999 and 1265 of 2000 are hereby dismissed. The Judgment and order dated 12.10.1999 passed by the learned Tribunal in O.A.No.115 of 1997 is hereby confirmed. No order as to costs.

14. At this juncture learned Counsel Mrs.Bhatt for the Union of India requested to grant 4 months time to implement the order of the Tribunal. Having regard to the peculiar facts and circumstances of the case the request is granted. Stay granted earlier stands vacated subject to 4 months' time given to the Union of India to implement the order of the Tribunal.

sd/-

(B. J. Shethna, J.)

Date : June 25, 2003 sd/-

(Akshay H.Mehta,J.)

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